HARVARD
LAW REVIEW

VOL. XXVIII DECEMBER, 1914 NO. 2

MUTUALITY AND CONSIDERATION

I

THE underlying principle of consideration would seem to be negative, — a denial that ordinarily there is sufficient reason why gratuitous promises should be enforced. From a nude pact no obligation arises. The courts have not felt impelled to extend a remedy to one who seeks to get something for nothing. English law accordingly will not usually enforce a promise unless it is given for value, or the promise of value, *i. e.*, something which the law must assume to be of some value to the promisor and which the parties make the subject of bargain or exchange.[1]

Some classes of gratuitous promises, however, may properly be deemed binding as having other good grounds of enforcement than consideration in the sense of value received. Such are formal promises under seal. So promises of gifts which induce action in reliance thereon, although born naked into the world, may become swaddled after birth in what may be termed a *quasi-estoppel*.[2]

[1] 2 Pollock and Maitland, History of English Law, pp. 211, 212. In the early Roman law a gratuitous promise was only enforceable if made under all the solemnities of a formal contract. Girard, Droit Romain, p. 608. In modern German law a similar requirement exists, and an agreement by which a future gift is promised is invalid unless made by a public act. Schuster, German Civil Law, §§ 97, 200. Thus the underlying principles of other legal systems are more similar to our own than is usually admitted.

[2] Recognized by many courts, for example, where steps are taken and expenditures are incurred on the faith of a charitable subscription. 11 Mich. L. Rev. 425; 7 Com-

So promises based on moral obligations of a not too diaphanous sort are coming more and more to be regarded as having a decent vestment.[3] Except in these classes of cases, however, the common law modestly declines to enforce a promise unless made by way of bargain in return for value present or future. The traditional theory (or superstition), with which I venture to differ, insists on a finding of present value actually received in bilateral as well as unilateral contracts. May we not more satisfactorily explain the consideration element of bilateral contracts as residing in mutuality or reciprocity of engagement, and the nature of the transaction as non-gratuitous? In other words, should we not frankly recognize that promises may be bought upon credit as well as for cash or value received?

In a recent article, supplementary to his noteworthy article of twenty years before, Professor Williston has surveyed anew the theory of consideration in bilateral contracts and has advanced a renovated definition of such consideration.[4] Coming from so authoritative a source his carefully elaborated formula deserves, and will no doubt receive, wide attention.

The result of Professor Williston's argument, supported by a learned array of authorities, is "that no briefer definition of sufficient consideration in a bilateral contract can be given than this: *Mutual promises each of which assures some act or forbearance that will be, or apparently may be, detrimental to the promisor or beneficial to the promisee, and neither of which is rendered void by any rule of law other than that relating to consideration, are sufficient consideration for one another.*"

As a great admirer of Professor Williston, both personally and as a teacher and writer, I regret to find myself in disagreement with him in any particular. I am indeed in substantial agreement with him as to the authorities and the practical results. I feel

---

mercial Laws of the World, p. 81; Brokaw *v.* McElroy, 143 N. W. 1087 (Iowa, 1913); Y. M. C. A. *v.* Estill, 140 Ga. 291, 78 S. E. 1075 (1913); see note, 48 L. R. A. N. S. 783.

[3] Recognized by some courts when based on moral obligation arising from unjust enrichment by the receipt of a material benefit, or arising from the infliction of a material loss, being an extension of the principles of quasi-contract, where a tangible moral duty is recognized by express promise. 7 Commercial Laws of the World, p. 85; note to Muir *v.* Kane, 26 L. R. A. N. S. 519, 532.

[4] 27 HARV. L. REV. 503; *cf.* 8 HARV. L. REV. 27.

called upon, however, to dissent from his explanation and theory of those results, especially as he has inadvertently, in a passing reference to an article by me,[5] stated in a somewhat misleading way my theory of the element of consideration in bilateral contracts, and by a knock-down argument demolished a man of straw.

As I view it, the doctrine of consideration is an attempt to generalize and reduce to a rule or formula that mutuality or reciprocity which must exist in an agreement to make it non-gratuitous and so worthy of enforcement. It is a test to distinguish gratuitous promises from those in which there is found mutuality of concession or benefit flowing to each party. Any degree of reciprocity will suffice to keep a pact from being nude or gratuitous. Wherein, then, is this reciprocity to be found in bilateral contracts? Professor Williston, in effect, insists upon *mutuality of obligation* as part of his test, although he objects vigorously to this terminology.[6] The proposition is indeed usually stated as being absolutely axiomatic, that unless both parties are bound, neither will be bound; yet I make bold to deny that mutuality of obligation is an essential element of a contract or of consideration, and find the element of reciprocity in the *mutuality of engagement* or undertaking by each party, — regardless of the legal effect of the promise. This is more in line with Professor Williston's former mode of statement that the test is whether each side has promised something the performance of which will be or *may be* a detriment. It seems also more in accordance with the definitions quoted and relied on by him in his present article.[7]

To Professor Williston belongs the credit of having pointed out the question-begging fallacy in Langdell's theory. Langdell started with the premise that we must find in bilateral contracts a present detriment incurred on each side at the instant the con-

[5] 27 HARV. L. REV. 504, note referring to 11 Mich. L. Rev. 423.

[6] 27 HARV. L. REV. 525.

[7] 8 HARV. L. REV. 27, 35. Leake on Contracts, 1 ed., p. 314; 2 ed., pp. 612, 613: "Whatever matter, if executed, is sufficient to form a good executed consideration; if promised, is sufficient to form a good executory consideration." So in the 6 ed., p. 435: "The consideration is the matter accepted or agreed upon as the equivalent for which the promise is made." So, according to Lord Blackburn, executory consideration exists "*if what the plaintiff has agreed to do* is either for the benefit of the defendant or to the trouble or prejudice of the plaintiff." Bolton *v.* Madden, L. R. 9 Q. B. 55, 56 (1873). Currie *v.* Misa, L. R. 10 Exch. 153 (1875), cited 27 HARV. L. REV. 520, n. 41.

tract is made, applying the same test of consideration to bilateral contracts as to the older unilateral contracts. He argues that the consideration of a promise must always be strictly contemporaneous with the promise itself. In bilateral contracts the only thing contemporaneous with either promise is the counter promise. The promise is all that the promisor gets in exchange and all that the promisee parts with. Unless a promise is binding and imposes an obligation, it cannot be considered a detriment; and the reason that a promise is a sufficient consideration is that it is binding and so creates a detrimental obligation.[8]

Langdell thus argues that each promise in a bilateral contract imposes a detriment because it is an obligation, and it becomes an obligation because it imposes a detriment. This seems to be counting one's chickens before they are hatched, and to be relying on the results of a rule to furnish its cause.

Professor Williston admits that there is no logical justification for holding mutual promises good consideration for each other, if the value of such consideration must always be found in a present detriment, imposed at the instant the promise is made. He avoids the question-begging assumption of Langdell by admitting that the requirements of consideration in bilateral contracts do not include a present detriment incurred when the contract is made, such as must be found in a unilateral contract. The needless assumption of such a requirement is the source of the logical difficulties in the reasoning of Langdell, Pollock, and Ashley, and leads Sir Frederick Pollock to characterize the doctrine as "one of the secret paradoxes of the Common Law." [9]

According to Professor Williston (who in this agrees with Ames) it is the promises in fact which are exchanged, not the obligations resulting therefrom. The promise in fact is of sufficient potential value if it gives assurance of something of possible value, and is a promise that may become binding, *i. e.*, is not rendered void by

---

[8] Langdell, Summary of Contracts, §§ 81, 84.

[9] See Williston, 27 HARV. L. REV. 508, 518; see also article by the writer, 11 Mich. L. Rev. 430; 30 L. Quart. Rev. 129; Pollock, Contracts, 8 ed., p. 191: "In fact there is no conclusive reason other than the convenience of so holding, for the rule that promise and counter promise will make one another binding; for neither of them before it is known to be binding in law, is in itself any benefit to the promisee or burden to the promisor."

incapacity or any rule of law other than that relating to consideration. To put it in somewhat different terms: where the law operating on the promises can produce mutuality of obligation, it will so operate, otherwise it will not operate upon either; and therefore promises on which it can operate are of value. Professor Williston avoids the absurdity, into which the premises of Langdell and Pollock lead them (of holding that a *promise* to perform what one is already under contract with another to do, may be a more valuable consideration than actual performance itself), by adding the requirement that the thing promised as well as the promise be something of value. While he thus gives up present detriment as the test of consideration in bilateral contracts, and judges of its sufficiency by the character of the things promised, he nevertheless still adheres to the view that consideration necessarily involves some kind of present value received, and declines to think of consideration as being executory, *i. e.*, future value to be received. The promise in fact furnishes present potential value in exchange, because it will have actual value when it becomes binding. But what I conceive to be the mistaken starting point in this theory, as in that of present detriment, is the needless assumption that (in the words of Professor Williston) a promise has no consideration "wherever the thing in consideration for which the promise is offered was not actually given."

The *quid pro quo* of an action of debt must be something actually given or done. When the action of *assumpsit* was first introduced in the sixteenth century, the only consideration recognized was an executed consideration, value actually given or detriment incurred.[10] To extend the action to bilateral contracts without appearance of change, it was said that "mutual promises are consideration for each other," and this became the language of pleading and of the courts. But the courts have never stopped to analyze what they meant by "promise." They simply meant that executory consideration was sufficient. It is therefore not necessary to take this loose and uncritical language of the judges and pleaders literally.

Professor Williston apparently attributes to me the position that consideration is to be found in the exchange of actual performances, and that it is the actual performances which are considera-

[10] W. S. Holdsworth, 11 Mich. L. Rev. 347.

tion for each other.[11] What I have endeavored to show, however, is that the element of consideration or reciprocity must be found not in the actual performances nor in the promises but in the *promised performance*, *i. e.*, in the nature, relation, and future value of the *contemplated* performances.

Like many legal mottoes and catch phrases, the easy and time-honored formula that promise is consideration for promise is but a legal "bromide," which is ordinarily used as a substitute for thought, to disguise a lack of analysis under vague and specious words. It is submitted that "*promise*" here means neither the expression of assent or agreement, the promise in fact; nor the obligation which results therefrom; nor the actual performance; but the promised performance, that is, the prospective value bargained for. Any mutual promises which contemplate the possibility of a required performance on each side constitute a contract, since they involve mutuality or reciprocity in the things promised. If a promise is made in view of a benefit to be received, and if something of possible value is promised in return, that is sufficient consideration. This interpretation of terms does not involve any serious upset in received legal terminology, and is in accordance with the practice of the courts, who according to Professor Williston in discussing the sufficiency of consideration have always "considered the character of the things promised."

It is doubtless true that "parties to a bilateral contract always contemplate that performance on one side is an exchange or price for performance on the other." This is the basis of implied conditions or the dependency of the duty of performance upon the counter performance, according to Professor Williston.[12] But I do not find that reciprocity which furnishes the consideration or source of obligation in the actual performance (which may never occur), but in the *promised* performances, the reciprocity of undertakings in the terms of the bargain.

Take the case put by Professor Williston as not being covered by my theory: "If A. promises B. to guarantee a debt of $100 due to B. from X. in return for B.'s promise to A. to guarantee

[11] 27 HARV. L. REV. 504, n., commenting on my article in 11 Mich. L. Rev. 432. A similar misinterpretation was also fallen into by Dean Ashley in his article in 26 HARV. L. REV. 429.

[12] Wald's Pollock on Contracts, pp. 323, 324, n. 8.

payment of $500 due A. from Y., the performances are in no sense in exchange for one another, or the consideration of one another, and yet there is a contract.

"Matters may so turn out that either party alone may be called upon to perform, or that both parties, or neither party, may have to pay. The promises are exchanged, though the performances are not expected to be; and even though the chance falls out that both parties have to pay, their payments are not in exchange for one another. They never proposed to exchange $100.00 for $500.00. The facts supposed are suggested by *Christie* v. *Borelly*, 29 L. J. C. P. N. S. 153 (1860)." [13]

This is all quite true, but I do not see that it militates against the theory of consideration proposed. The reason the law regards the agreement as binding is that it is a non-gratuitous transaction involving some degree of reciprocity or mutuality from the standpoint of the parties, not because there is an exchange of present values. I submit that the assumption of a requirement of present value received in bilateral contracts is as unnecessary to the theory of consideration as Professor Williston himself concedes Langdell's assumption of a present detriment to be. From what is this premise derived but from the discarded analogy of unilateral contracts?

Take the simple case of a bet which illustrates the situation in all aleatory or risk contracts. A. bets ten dollars Yale will win; B. bets ten dollars Harvard will win. Under no possibility here can there be an exchange of performances; but is it a case of benevolence, of gratuity, on either side? No, the mutuality or reciprocity is obvious. Why? Because of an exchange of values in promises or obligations? No. It is because the bargain contemplates possible performance on either side, and because each side stands a chance to win. That is why it is not a one-sided gratuity, a case of "heads I win, tails you lose." Performance is not to be given in exchange for performance, but the possibility of performance on one side is undertaken in exchange for the possibility of performance by the other side. Neither promise is gratuitous, although neither promise is given for value received, but on credit for the chance of value to be received.

To paraphrase the argument of Professor Williston in speaking

[13] 27 HARV. L. REV. 504, n.

of conditional promises, and to apply it to the things promised, — it is not necessary in order that a thing promised furnish reciprocity, that it will certainly prove detrimental to the promisor or beneficial to the promisee. The possible or speculative value of a contingent performance is a sufficient consideration. The condition upon which performance is to take place may not happen, but the possibility that the condition may take place involves a chance of benefit, which is sufficient to furnish reciprocity, and make the thing promised valuable consideration. The reciprocity is as real where the contingency has already happened, and is unknown, — for example, insurance of a ship lost at sea, — as it is in the case of a risk on a future event. Where the bargain, so far as known, may turn out to be beneficial to either party, there is mutuality. The value legally sufficient to support a promise may be a present one or a future one, a certain one or a contingent one, provided that the contingency is independent of the choice of the promisor, according to the terms of the undertaking.

The theory that an executory consideration is some kind of value received, and that a binding promise is the *quid pro quo* or value given for a promise, logically requires that there should be absolute mutuality of obligation, so that each party will have an action to enforce the counter promise. As a federal court puts the theory: "A promise is a good consideration for a promise. But no promise constitutes a consideration which is not obligatory upon the party promising. It must bind the promisor, *so that the promisee may maintain an action for its breach*, or it is without legal effect and void." [14]

Professor Williston accordingly lays it down in his more recent article, that a promise is of no value unless it both gives assurance of the performance of something of possible value, and unless it will also be binding. A promise which is *void* is therefore insufficient consideration. Professor Williston candidly admits, however, that "contracts, where one promise is *voidable* or unenforceable, present some difficulty with regard to the law of consideration." [15] Should one not say rather with regard to this *theory* of the law of consideration, which seems to break down in these crucial

[14] Cold Blast Transp. Co. *v.* Kansas City, B. & N. Co., 114 Fed. 77 (1902).
[15] 27 HARV. L. REV. 507.

cases? It is usually said that a voidable promise of an infant, for example, is regarded by the law as something of value.[16] But as Professor Williston admits, "The promise of an infant, an insane person, or one whose promise is performable only at his option, is not a thing of such value, whatever may be the nature of the thing promised, that the law would ordinarily regard such a promise as sufficient consideration." [17] A promise to perform "if I choose," or "if I conclude to ratify," or "unless I avoid or cancel," would be insufficient as lacking mutuality.[18]

Many instances of unenforceable promises which, however, do not invalidate contracts might be given. Although a plaintiff may not be liable to an action on a contract because of the Statute of Frauds, that does not destroy the consideration, or let off the party who has signed the memorandum.[19] There are one or two decisions the other way, but they are against the overwhelming weight of authority.[20] Similarly there is no difficulty about consideration although the contract is entirely unenforceable *ab initio* by one of the parties on account of insanity, drunkenness, fraud, or illegality. In all these cases and others it may be binding on one party and not on the other.[21] Would these cases not suggest that there is a distinction somewhere between lack of consideration and lack of mutuality of obligation, and that lack of mutuality in the legal effect of promises is immaterial?

Apparently the greatest, if not the only, function of the orthodox doctrine that only a binding promise is valuable consideration, is to explain why the bilateral contract of a person *sui juris* with a married woman is entirely void, *i. e.*, not enforceable even against him. The whole justification of the literal interpretation of the formula that a promise is consideration for a promise, is therefore in effect placed on the shoulders of married women. But is the voidable promise of an infant of more value to the adult party than the void promise of a married woman? The infant's promise is not merely of zero value, it has a minus value. It is not an asset,

---

[16] Williston, Sales, § 12.

[17] 27 HARV. L. REV. 528.

[18] Rehm-Zeiher Co. *v.* F. G. Walker Co., 156 Ky. 6, 160 S. W. 777 (1913).

[19] Justice *v.* Lang, 42 N. Y. 493, 521 (1870).

[20] Houser *v.* Hobart, 22 Idaho 735, 127 Pac. 997, 43 L. R. A. N. S. 410, n. (1912).

[21] San Francisco Credit Clearing House *v.* MacDonald, 18 Cal. App. 212, 122 Pac. 964 (1912).

but a liability, as the adult is bound and the infant is not until he ratifies. According to some courts, at least, if a married woman contracts to buy on credit and executes a note for the purchase price, she may or may not proceed with the contract she has made as she may elect, and the person contracting with her cannot refuse to carry out the agreement if she is willing, merely because she is a married woman.[22]

Would it not be better, therefore, to explain the married woman cases simply as being very logical deductions by some courts from a mistaken premise that want of mutuality of obligation is a defense to a contract? Admitting that the married woman could sue the other party after performance or if she furnishes other consideration than a promise,[23] this single instance is scarcely sufficient to form the corner stone of the entire theory of executory consideration, and to afford the premise from which it purports to be deduced. It might have been fair and just for the law to add to the consideration requirement a rule calling for mutuality of legal obligation in all bilateral contracts. Yet in spite of language used by courts and text writers to this effect such has not been the policy adopted by the common law save in one or two sporadic instances. "Illusory promises," though usually explained in terms of mutuality of obligation, can only be harmonized with the voidable-contract cases by discriminating lack of reciprocity of undertaking from lack of mutuality of legal obligation. *Ultra vires* contracts are sometimes mentioned in this connection, but these contracts are to be explained as being void rather on grounds of public policy [24] than for lack of consideration. The treatment of *ultra vires* contracts would seem to be anomalous, confused, and exceptional, and to furnish small material for argument as to other topics.

Professor Williston is forced by his theory to brush aside all the cases of voidable contracts as anomalous and hopeless exceptions

[22] Pitts *v.* Elser, 87 Tex. 347, 28 S. W. 518 (1894); see also Frazier *v.* Lambert, 115 S. W. 1174 (Tex. Civ. App., 1909); Mansley *v.* Smith, 6 Phila. 223 (1867); Dickson *v.* Kempinsky, 96 Mo. 252, 9 S. W. 618 (1888).

[23] Chamberlin *v.* Robertson, 31 Ia. 408 (1871); Dickson *v.* Kempinsky, 96 Mo. 252, 258, 9 S. W. 618 (1888); McQuitty *v.* The Continental Life Ins. Co., 15 R. I. 573, 578, 10 Atl. 635 (1887); Tuttle *v.* Rembert, 2 Strob. (S. C.) 270 (1847); Jackson *v.* Rutledge, 3 Lea (Tenn.) 626, 632 (1879).

[24] Copper Miners *v.* Fox, 16 Q. B. 229, 237 (1851), cited by Ames, 13 HARV. L. REV. 34.

to his rule of consideration, since they lack mutuality of obligation. But if all these cases may be satisfactorily reconciled and explained on a simple and reasonable theory of consideration, it seems better to seek an underlying principle which is an almost universal solvent, rather than to ascribe these results to common error, or deal with them as exceptions unjustifiable on principle, merely to lay down a rule to fit the language of the courts and some married woman cases.

A theory of consideration is after all only a generalization of the cases and of the policy of the law, and if a given hypothesis won't work, and won't explain close cases, and if it goes lame when the shoe begins to pinch, then we should modify our theory and even our habitual terminology to fit the facts.

The lack of mutuality referred to so frequently by the courts which results in lack of consideration would not seem to be truly based on the alleged rule that both promises must be binding in law or neither is binding. It is not mutuality of obligation or remedy, but mutuality of engagement, which is actually required. The promises must be obligatory only in the sense of being obligatory according to their terms. A distinction must therefore be made between cases where by the terms of the bargain the plaintiff does not make any reciprocal undertaking and promises nothing definite or certain in return, and cases where lack of mutuality and obligation is due to some fact outside of the content of the bargain, such as incapacity, Statute of Frauds, illegality, duress, fraud, or other negative element. These two classes of cases seem to be entirely distinguishable in principle. In the first, we have an entirely one-sided proposition, — what is sometimes unfortunately referred to by the courts as a "unilateral contract." In the second, we have all of the affirmative elements of a valid contract, but the obligation of one of the parties is affected or taken away owing to the presence of some defense or negative element which does not affect the obligation of the other.[25] These cases of voidable promises can therefore be satisfactorily explained only on the theory here advanced, viz., that there is ample consideration at present in the reciprocity or mutuality of the respective undertakings, although one of the parties to the contract may have an absolute personal

[25] Compare Page on Contracts, § 303.

defense. A promise by a minor, therefore, furnishes consideration, not because there is any value in a voidable promise, but because there is reciprocity in the terms of the bargain. Here the law gives the infant the personal privilege of receding from it at his pleasure. If, however, a would-be seller should make a proposition to deliver such quantity of any commodity as an infant buyer might choose to order, and the infant accepted it but did not agree to order any definite quantity, or reserved expressly a right to cancel his order, such a contract would doubtless be held lacking in mutuality and void *in toto*. There is therefore no exception to the ordinary requirements of mutuality in the case of an infant's contract. The disability of the infant, whereby he is exempted from the obligation of his contracts, is not created by the law for the benefit of those who contract with him, but for his own protection.

It would seem to be a sound principle of law which demands some mutuality or reciprocity of engagement as the basis of a contract and which refuses recognition to an entirely one-sided proposition in which one of the parties promises nothing definite in return.[26] From this it will usually follow that one party will not be able to go into court to enforce a contract unless the other can. But this is not what the requirement really means, although the loose language of the courts usually puts the symptom for the cause. The distinction between an option to perform given by the terms of the contract and an absolute defense given by the law is a substantial one, as in the former case the elements of a contract were never present, while they are in the latter, and the law gives a defense to one party only on grounds of justice or policy toward him.

I would accordingly venture to propose a modified version of Professor Williston's definition to read as follows: Consideration is something of possible value given or *undertaken to be given* in return for something promised.[27] A bilateral contract is based on sufficient consideration which by its terms is a bargain involving any appreciable degree of mutuality or reciprocity in the things promised on each side. The test of this is whether the performance promised will be or apparently may be legally detrimental to the promisor or legally beneficial to the promisee. There is consideration even though the promises on one side may be unenforceable

[26] Williston, Sales, pp. 203, 798, 800.

[27] See Currie *v.* Misa, *supra*.

by reason of some negative element in the contract which excuses one of the parties from liability thereon. The test of the consideration is the possible value of the thing promised and not the effect of the promise itself.

Under the lead of Langdell there has been a tendency to take detriment as the universal test of the sufficiency of consideration, and to say that the detriment alternative had swallowed up the benefit alternative of the usual definitions.[28] It would seem, however, that the essence of the idea of consideration is reciprocity in the possible benefit or value to the promisor of the thing promised in return, rather than the detriment or burden to the promisee. The incurring of detriment on the faith of the promise is indeed the true basis of the subscription paper and other *quasi-estoppel* cases, but not of wholly executory contracts. Consideration need not move from the promisee directly to the promisor, or be in fact beneficial to him, in order to furnish a sufficient basis to make the promise binding.[29] For one cannot say that what he has bargained for is not of value to him unless it conclusively appears so on its face or from its own intrinsic nature, as where it is something to which he is already entitled.

I do not propose to attempt a discussion of the desirability of the legal benefit-detriment test of the sufficiency of consideration adopted by Professor Williston as compared with the Ames theory. Professor Ames contended that the attempt to formulate a technical test to measure the sufficiency in value of what is promised or given as consideration in bargains has not proved a success. He pointed out that this attempt has encumbered the law with unreasonable distinctions and subtleties which serve no useful purpose.[30] Professor Ames argued that the detriment test functions properly only in cases which could better be put on other grounds, and that where the basis of a bargain was vicious, as abstaining from a crime, a tort, a breach of contract or legal duty, or the taking of unfair advantage of the necessities of the other party, there the contract should be held invalid as being illegal or

[28] Langdell, Summary of Contracts, § 64.

[29] Drovers', etc. Bank *v.* Tichenor, 156 Wis. 251, 145 N. W. 777 (1914).

[30] 12 HARV. L. REV. 530; 13 HARV. L. REV. 29; see also Melroy *v.* Kemmerer, 218 Pa. 381, 67 Atl. 699 (1907); *Ex parte* Ziegler, 83 S. C. 78, 64 S. E. 513, 916, 21 L. R. A. N. S. 1005, n. (1909).

contrary to public policy rather than as lacking in consideration, which he found in the exchange of all promises in fact.

Whether the attempt has proved wise or not to measure the sufficiency of consideration by a technical and mechanical formula, there can be no doubt, as Professor Williston shows, that this represents the settled policy of the law. If we recognize gain or benefit to the promisee, we can uphold the view of the English courts and of a minority of American courts that the completion of contracts with a third party (or the promise thereof) is valid consideration for a promise.[31] This would meet some of the strongest instances put by Dean Ames where the test of legal detriment leads to unsatisfactory results.

What, then, in conclusion, is the basic reason why the law in general finds a ground for the enforcement of executory two-sided bargains and not of one-sided or gratuitous promises? I believe the answer is a broad but simple one. Without some positive sanction or legal guarantee that reciprocal bargains are binding, men would be unable to do business or make reliable arrangements for the future. Good faith and honesty demand that men be entitled to rely on their bargains, and that they stand by them if they are reciprocal. Mutuality or reciprocity characterizes all fair business transactions. It is not in the mutual expression of assent, nor in the legal effect of the promises however that reciprocity is sought, but in the content of the bargain, the possible value to be received on either side.

Is not the literal interpretation of promise for promise as *quid pro quo* (*i. e.*, present value actually received on each side in the making of the contract), like the supposed incurring of a present detriment, merely a factitious attempt to assimilate executory consideration to executed consideration? There must, of course, be mutuality of assent. But is not the actual value bargained for a future value? If we formulate the real policy which dictates the consideration requirement, and on which the cases are decided, instead of taking too seriously the pseudo-scientific language of the courts, we may at last put the theory of executory consideration on a logical, consistent, and intelligible basis.

Henry Winthrop Ballantine.

UNIVERSITY OF WISCONSIN.

[31] Abbott *v.* Doane, 163 Mass. 433, 40 N. E. 197 (1895).